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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6289

INEZ MOORE,

Appellant,

—v.—

CITY OF EAST CLEVELAND, OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GREATER CLEVELAND, *AMICI CURIAE*

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INTEREST OF AMICI CURIAE

Leave to file a brief amicus curiae was granted the American Civil Liberties Union by order of the Court on June 21, 1976.

The American Civil Liberties Union files this brief to establish that the Ordinances of the City of East Cleveland at issue in this case, which prohibit the

appellant from living in the same home with all of her grandchildren, are unconstitutional. We believe the ordinances infringe fundamental rights in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

ORDINANCES INVOLVED

§1351.02 LIMITATION ON OCCUPANCY

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family.

§1341.08 FAMILY

Family means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) husband or wife of the nominal head of the household.

(b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) father or mother of the nominal

head of the household or of the spouse of the nominal head of the household.

(d) notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) a family may consist on one individual.

STATEMENT OF FACTS

The violation of the ordinances arises from the fact that appellant's home is occupied by herself, her elder son, his son, her younger son, and his son, John Moore, Jr., now ten years old. Under §1341.08(d), "family" is defined to exclude appellant's ten-year-old grandson. Appellant was convicted and sentenced to five days in jail and fined $25.00.

SUMMARY OF ARGUMENT

The effect of Appellee's ordinance

§1341.08, operating in conjunction with §1351.02, is to deny Appellant and her family the right to live in East Cleveland. Her right to determine basic family relationships and her rights of association and privacy in the family context are arbitrarily infringed by Appellee's ordinance despite the fact that this deprivation of fundamental rights is not necessary to promote any compelling interest of East Cleveland. This lack of relationship between the purposes asserted for the ordinance and the means chosen to further such purposes in itself is sufficient to constitute a violation of Equal Protection, but the ordinance is further flawed by its failure to draw its classification in such a way as to minimize intrusion on constitutionally protected rights. Even under the lesser degree of scrutiny applied to statutes not affecting fundamental rights the ordinance in issue here violates the Equal Protection clause because the classification it creates does not bear a reasonable relationship to the asserted purposes.

In addition to these Equal Protection violations, the ordinance fails to meet the requirements of the Due Process Clause. The right to free choice in matters of family life, the right to privacy in the family context and the right of free association are all protected "liberties" under the Due Process Clause, and the lack of relationship between the means and asserted ends of the ordinance alone renders it unconstitutional. A further Due Process

violation is found in the failure to choose the means which least affect fundamental liberties, as the ordinance deprives many families of their protected rights despite the fact that they do not contribute to the problems it attempts to control. Yet a conclusive presumption is raised that any family units outside the restrictive definition of "family" necessarily contribute to the problems of overcrowding of the schools and traffic congestion; such presumptions violate Due Process for their arbitrary deprivation of personal liberties.

Thus Appellee's ordinance §1341.08 is unconstituional for its violation of both the Equal Protection and Due Process Clauses and should be held void.

ARGUMENT

I. EAST CLEVELAND'S ORDINANCE DENIES APPELLANT EQUAL PROTECTION OF THE LAWS.

The effect of East Cleveland ordinance §1341.08 is to deny the Moore family, which has adopted its living arrangement out of necessity, the right to live in East Cleveland. This ordinance infringes fundamental rights but is not necessary to promote a compelling governmental interest and thus violates the Equal Protection Clause.

A. The Fundamental Nature of the Right Asserted by Appellant Prohibits Appellee From Infringing Such Right Without a Compelling Governmental Interest.

There are special constitutional protections afforded the family:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390,399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince

> v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." Glona v. American Guarantee Co., 391 U.S. 73, 76-76 (1968). Stanley v. Illinois, 405 U.S. 645, pp. 651-652 (1972)

Thus the fact that Appellant's family is not an average nuclear family with a mother, father and children does not mean that the Constitutional protection afforded her is any the less. Yet the interest asserted by Mrs. Moore in this case is not simply the importance of the right to maintain her family unit. Her interest encompasses the right to pursue one's private interests and to associate freely with others

in so doing, a right which has been held to be clearly protected by the Fourteenth Amendment, N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); this right should be especially protected in the family context. The right to privacy, emanating from several fundamental constitutional guarantees, has been upheld in various contexts but especially in situations bearing on family lifestyle and relationships, "a right of privacy older than the Bill of Rights," Griswold v. Connecticut, 381 U.S. 479, 486 (1965). In Stanley v. Georgia, 394 U.S. 557, 564 (1969), the Court said:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone --the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Because of the fundamental nature of the interest which is infringed by Appellee's ordinance, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a

compelling governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The asserted purposes of §1341.08--prevention of overcrowding, of burdening the schools and of traffic congestion--do not rise to the level of compelling interests.

Further, in this case the lack of direct relationship between the households excluded by §1341.08 and the evils the ordinance seeks to reduce is sufficient to render this ordinance unconstitutional, as the means are not necessary to promote the interests asserted by Appellee, whether or not such interests are compelling.

Yet even if a compelling interest furthered by East Cleveland's ordinance could be shown, such an interest alone is not sufficient to sustain the ordinance if the means chosen to protect that interest unnecessarily infringe protected freedoms. In scrutinizing durational residence requirements imposed on voting rights in Dunn v. Blumstein, 405 U.S. 330, 343 (1972), the Court stated:

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing the important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting consti-

tutional rights must be drawn with "precision," NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. Shapiro v. Thompson, supra, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The exclusion of many family units which would not contribute to the problems §1341.08 is intended to control renders the ordinance unconstitutional for its failure to employ the least intrusive means available. A more precisely drawn ordinance would avoid the infirmity of unnecessarily infringing the constitutional rights of those families who do not contribute to the problems the statute seeks to avoid. But the ordinance as it stands violates the Equal Protection Clause of the Fourteenth Amendment and is unconstitutional.

B. Even If Less Rigorous Scrutiny Is Applied the Means Chosen by Appellee Are Not Reasonably Related to the Purposes of the Ordinance and Violate the Equal Protection Clause.

The arbitrary nature of this ordinance is so apparent that even if the less rigorous, rational relationship test were applied it would be found to be unconstitutional. In assessing a statutory preference for male estate administrators where competing applications have been filed by both male and female members of the same entitlement class, the Court in Reed v. Reed, 404 U.S. 71, 75-76 (1971), described the applicable test as follows:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

The Court there held that to give a mandatory preference to members of either sex simply for the purpose of eliminating hearings on the merits was precisely the arbitrary legislative choice forbidden by the Equal Protection Clause. The classification embodied in East Cleveland's ordinance is no less arbitrary, and the means by which Appellee has chosen to further the purposes

which it alleges are the basis for this ordinance are not fairly and substantially related to those purposes. The interests of the community in preventing excessive traffic problems and overcrowding of the schools, while legitimate, are not directly furthered by this ordinance, which is totally void of any reference to the number of persons living in any one dwelling but is instead based solely on the relationship of those persons and as such is an invidious discrimination against legitimate family relationships.

The Court relied on the Reed v. Reed formulation of the rational relationship test in Village of Belle Terre v. Boraas, 416 U.S. 1 (1973), to uphold a village ordinance which restricted land use to one-family dwellings and defined "family" to include one or more persons related by blood, adoption or marriage, or not more than two unrelated persons living as a housekeeping unit. The ordinance in question precluded large groups of unrelated persons from living as units in a family residential area, which would have upset the family orientation of the neighborhood. In contrast to Belle Terre's attempt to limit living units to a family of related members or an unmarried couple, the East Cleveland ordinance at issue here attempts to delimit what constitutes a family within the confines of blood relationships, resulting in an arbitrarily drawn line. Further, because of Appellant's family

relationships she has constitutionally protected rights not available to unrelated persons who group together for convenience, such as her rights of association and privacy in determining her family relationships. That the critical importance of family values is particularly relevant in the context of zoning was recognized by the Court in Village of Belle Terre v. Boraas, supra, at 9, which is based largely on the value of providing neighborhoods conducive to family life:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Given the critical nature of the interest asserted by Appellant in this case, an interest which this Court has consistently protected, the lack of any reasonable relationship between East Cleveland ordinance §1341.08 and the goals it seeks to fulfill creates a particularly invidious form of discrimination and it should be held unconstitutional for violation of the Equal Protection Clause.

II. THE EAST CLEVELAND ORDINANCE VIOLATES THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT

Appellant's protected freedom to exercise her personal choice as to which family members she will reside with, her freedom of association and of privacy in the context of her own home, have been denied by East Cleveland's ordinance in violation of the protection afforded Appellant by the Due Process Clause of the Fourteenth Amendment. The necessary relationship between legitimate governmental goals and the means chosen to further such goals is missing from this statute, and the further failure to tailor the ordinance so as to minimize infringement on protected freedoms renders the statute unconstitutional. Further, the ordinance sets up an irrebuttable presumption, a legislative approach which has long been disfavored under the Due Process Clause.

A. The East Cleveland Ordinance Fails to Comply with the Fundamental Requirements of Due Process

The Due Process Clause of the Fourteenth Amendment prohibits the state from depriving any person of life, liberty or property without due process of law. In defining this protected liberty, the Court has said:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to con-

> tract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923)

The basic rights asserted by Appellant in this case are her rights to free association and to privacy, in the very special context of family life. It is "beyond debate" that freedom of association is "an inseparable aspect of the 'liberty'" protected by the Due Process Clause, N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958). The Court has also stated that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . ." Roe v. Wade, 410 U.S. 113, 153 (1973). Such rights become even more crucial when placed in the family context, the importance of which is such that this Court has determined that the right to free choice in family matters

is itself a due process protected liberty. In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974), the Court said:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113; Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, 381 U.S. 479; Pierce v. Society of Sisters, 208 U.S. 510; Meyer v. Nebraska, 262 U.S. 390. See also Prince v. Massachusetts, 321 U.S. 158; Skinner v. Oklahoma, 316 U.S. 535.

Appellant seeks to protect her right to determine basic family relationships and living arrangements on the basis of the needs of family members as opposed to an arbitrary definition of "family" imposed by the City of East Cleveland, as well as her broad rights to free association and privacy within the home. Any one of these rights in itself would be sufficient to invoke the protection of the Due Process Clause. Yet this ordinance fails to meet the criteria of due process.

As the Court stated in Meyer v. Nebraska, quoted supra, Due Process requires that where protected liberty is interfered with legislative action may not be arbitrary

or without reasonable relationship to a purpose within the competence of the state to effect. Thus as in Bates v. Little Rock, 361 U.S. 516 (1960), where the Court held that occupational tax license ordinances requiring local branches of the N.A.A.C.P. to disclose membership lists interfered with members' freedom of association and violated the Due Process requirements, the legitimacy of the goals sought to be furthered by the ordinances does not end the Due Process inquiry (361 U.S. at 524-25):

> It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. . . But governmental action does not auotmatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

Similarly in the present case the goals this ordinance is claimed to further may well be legitimate; however there is no reasonable relation between the means chosen and the ends they are intended to advance.

The means utilized here, a restrictive and unrealistic attempt to define what a family is, bear no relationship to the cited purposes of the East Cleveland ordinance, which generally relate to overcrowding, traffic congestion, undue burdens on the school system and community character. The classification drawn by the ordinance is unrelated to the number of persons that can be included in a family unit although the influences the ordinance seeks to control are basically a factor of numbers. The operation of this ordinance precludes families which are smaller than the number for which their dwelling is zoned, thus necessarily excluding families whose presence neither creates nor contributes to the evils sought to be controlled. This fatal overbreadth in the ordinance indicates the lack of reasonable relationship between Appellee's goals and the chosen means for carrying them out. The lack of reasonable relationship, which is more fully discussed in Appellant's Brief, controverts due process requirements and renders the ordinance unconstitutional.

The overinclusiveness of the category of families excluded from the ordinance is fatal on another Due Process ground: even where a governmental purpose is legitimate and substantial it cannot be pursued by means that broadly stifle fundamental liberties when the same ends can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479 (1960); Kusper v. Pontikes, 414 U.S. 51 (1973).

The Court in Shelton v. Tucker found that the state had a valid interest in inquiring into the competence and fitness of its teachers but that requiring each teacher to file annually an affidavit listing without limitation every organization to which he belonged or contributed in the past five years was an unnecessarily broad interference with a teacher's associational freedom. Similarly the East Cleveland ordinance is an unnecessarily expansive interference with Appellant's rights to free association, privacy and to determine her family life, for while some of the groups excluded from the statutory definition of family might contribute to the problems which the ordinance attempts to control it indiscriminately outlaws many family groups that would no more contribute to such problems than those families which fall within the statutory definition. The ordinance thus violates the Due Process Clause in two ways: the means chosen have no relationship to the legitimate ends, and the ordinance is not drawn so as to minimize infringement on constitutionally protected freedoms.

B. The East Cleveland Ordinance Creates a Conclusive Presumption That Families Not Within the Definition Will Contribute to Overcrowding and Traffic Congestion Problems, a Presumption Which Violates Due Process.

Appellee asserts that the purposes served by §1341.08's restrictive definition of "family" are the prevention of overcrowding, burdening the school system and traffic congestion. Families which do not fall within the definition have no opportunity to show that their presence in East Cleveland will not contribute to these problems; thus the ordinance raises a conclusive presumption that such family units will contribute to such problems, a presumption which violates Due Process mandates.

"Statutes creating irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S. 441, 446 (1973). This Court in that case declared unconstitutional under the Due Process Clause a Connecticut statute creating an irrebuttable presumption of non-residence for purposes of qualifying for reduced tuition rates at a state university, noting (412 U.S. at 452):

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

Similarly in Cleveland Board of Education v. LaFleur, supra, the Court held

unconstitutional mandatory maternity leave rules which created a conclusive presumption that a teacher who is four or five months pregnant becomes physically unable to continue her duties (414 U.S. at 644):

> The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See Shelton v. Tucker, 364 U.S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor--or the school board's--as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

The Court relied on the language of Vlandis v. Kline, supra, in finding the conclusive presumption not necessarily or universally true in finding the rules violative of Due Process. Similarly in

the present case the irrebuttable presumption raised by the East Cleveland ordinance is not universally true, and as in both Vlandis v. Kline and Cleveland Board of Education v. LaFleur there are reasonable alternative means of making the crucial determination. Investigation as to the number of persons in a household, the number of school age children and cars, could easily be made, and in fact such investigations are undoubtedly already carried on to insure that certain other zoning provisions, such as those regulating maximum number of person who can inhabit one dwelling, are complied with. While it might be argued that such investigations would be an administrative burden on the city, such inconvenience is not sufficient to justify the unconstitutionality of a conclusive presumption. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court held unconstitutional Illinois' procedure which conclusively presumed unwed fathers to be unfit parents, and stated (405 U.S. at 656-657):

> Despite Bell and Carrington, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes

higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and prehaps more than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Thus in addition to the basic failure of Appellee to tailor the ordinance to Due Process requirements, the unnecessary use of an inaccurate conclusive presumption allowing no opportunity for rebuttal infringes upon Appellant's freedoms as protected by the Due Process Clause, rendering the ordinance unconstitutional.

CONCLUSION

The lack of any relationship between the asserted purposes of East Cleveland

§1341.08 and the classification it utilizes and the unnecessary infringement on constitutionally protected rights of those whose presence does not contribute to the problems the ordinance seeks to control constitute basic violations of Equal Protection, under either formulation of the applicable tests that have been applied by this Court, and further violations of Due Process requirements. For these reasons, East Cleveland Ordinance §1341.08 should be held to be unconstitutional and void.

Respectfully submitted,

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